



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

OCT 20 2004

FIRST CLASS MAIL

Lyn Utrecht, Esq.
Ryan, Phillips, Utrecht & Mackinnon
1133 Connecticut Avenue, NW
Washington, DC 20036

RE: MUR 5440
New Democratic Network, and Simon
Rosenberg, as Treasurer

Dear Ms. Utrecht:

On April 7, 2004, the Federal Election Commission notified your clients, New Democratic Network, and Simon Rosenberg, as Treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to your clients at that time.

Upon further review of the allegations contained in the complaint, the Commission, on September 28, 2004, found that there is reason to believe that New Democratic Network, and Simon Rosenberg, as Treasurer, violated 2 U.S.C. §§ 434, 441a(f), 441b(a) and 11 CFR §§102.5, 104.10, 106.1 and 106.6, provisions of the Act. The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information. Allegations in the complaint regarding coordination remain under consideration and may be the subject of an additional notification. Please note that respondents have an obligation to preserve all documents, records and materials relating to the Commission's investigation.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office

within 30 days of receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

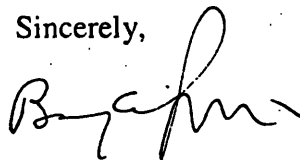
27044181621

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

If you have any questions, please contact Julie McConnell, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Bradley A. Smith
Chairman

Enclosures

Factual and Legal Analysis

27044181622

FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS

RESPONDENT: New Democrat Network and MUR: 5440
Simon Rosenberg, as Treasurer

I. INTRODUCTION

27044181623
This matter was generated by a complaint filed with the Federal Election Commission ("the Commission") by Bush-Cheney '04, Inc. *See* 2 U.S.C. § 437g(a)(1). The complaint received by the Commission alleges that New Democrat Network, and Simon Rosenberg, as Treasurer (collectively referred to as "NDN") are violating federal campaign finance laws by spending millions of dollars, raised outside the limitations and prohibitions of the Federal Election Campaign Act of 1971, amended ("the Act"), to influence the upcoming presidential election.

NDN argues in response to the complaint that, as a matter of law, its activities do not result in violations of the Act. Generally, NDN asserts that the complaint fails to provide facts or details describing any violation by NDN of the Act or Commission regulations. *See* Resp. of NDN (MUR 5440) at 2. NDN contends that its television campaign aimed at Latino voters and the status of Governor Bill Richardson as an advisor to the organization provides no basis for finding a violation. *See id.* NDN also asserts that it has not acted in coordination with Kerry for President or the Democratic National Committee. *See id.* at 3.

NDN appears to be operating as a nonconnected political committee with federal and nonfederal accounts, as described in 11 C.F.R. § 102.5. The federal account of this committee is registered with the Commission and regularly files disclosure reports.¹ NDN must comply with

¹ NDN PAC registered with the Commission on March 3, 2003.

the Act's contribution limitations, source prohibitions, and reporting requirements, but it also must comply with applicable statutory and regulatory provisions as interpreted in AO 2003-37, which addresses the application of the Act and regulations to various campaign activities of a registered political committee.

II. FACTUAL AND LEGAL ANALYSIS

A. FACTS

The New Democrat Network ("NDN") is registered with the Commission, and has a federal ("NDN PAC") and nonfederal ("NDN 527") account.² The website shared by NDN PAC and NDN 527 states that the mission of NDN is to elect "public servants at all levels of government who believe that the Democratic Party needs to find ways to lead our country into a new era while holding true to our most cherished values." NDN's advertising campaign includes anti-Bush advertisements aimed at Spanish-speaking persons, particularly in the swing states of Arizona, Florida, and Nevada. One television advertisement, attacking President Bush's lack of funding for higher education for minorities, features a girl asking, in Spanish, "President Bush, why did you break your promise?"

In the first quarter of 2004, NDN 527 paid \$275,000 to ZGS Communications for polling services. In the second quarter, NDN 527 listed \$1.2 million in disbursements to ZGS for production costs and media buys. In contrast, every expenditure made by NDN PAC this year has been a contribution to a candidate or to another political committee, with the exception of \$172 for operating expenses. Thus, it appears that NDN 527 paid for the advertisements.

² In its filing with the IRS, NDN 527 asserts that its purpose is "[f]undraising for Federal, State, and Local candidates."

B. ANALYSIS

In Advisory Opinion 2003-37, the Commission analyzed numerous proposed activities by a political committee with federal and nonfederal accounts, including solicitations and communications referring to a clearly identified federal candidate, voter identification and registration activities, get-out-the-vote ("GOTV") activities, and fundraising. The Commission determined that many of these activities were covered by the allocation regulations in 11 C.F.R. Part 106, and as for other activities not specifically covered by Part 106, the Commission identified the appropriate allocation ratio called for by the Act, as clarified by the recent ruling in *McConnell v. FEC*, 540 U.S. 93 (2003). AO 2003-37 at 2. Specifically, the Commission concluded that:

- Communications by a registered political committee, including fundraising communications, that promote, support, attack, or oppose a clearly identified federal candidate are "expenditures" that must be paid for with federal funds;
- Communications by a registered political committee for voter mobilization activities, even if they are not coordinated with a candidate and do not refer to any clearly identified federal candidate, must be funded at least partially with federal funds;³
- Funds received by a registered political committee from solicitations that promote, support, attack, or oppose federal candidates and "convey a plan" to promote, support, attack, or oppose federal candidates are treated as contributions; and
- Voter registration efforts of a registered political committee that target particular groups of voters must either be allocated or paid from federal funds.

³ The term "voter mobilization activity" refers generally to voter identification, voter registration, and GOTV activities. See 11 C.F.R. § 106.6(b)(2)(iii). The expenses for voter mobilization activity must be allocated between the federal and nonfederal accounts of the committee based on the ratio of federal expenditures to total federal and nonfederal disbursements made by the committee during the two-year federal election cycle. AO 2003-37 at 4 (citing 11 C.F.R. § 106.6(c)). Communications made by a political committee for voter mobilization activities that refer to more than one clearly identified federal candidate—or to federal candidates and nonfederal candidates (or the entire ticket)—must be allocated to each such candidate according to the benefit reasonably expected to be derived. AO 2003-37 at 3 (citing 11 C.F.R. § 106.1).

See AO 2003-37 at 2-4, 9-10, 13, 15, and 20.

Because the advertisements discussed above are public communications that promote, support, attack, or oppose a clearly identified federal candidate, they must be funded from NDN's federal account. New Democrat Network and Simon Rosenberg, as Treasurer, and New Democrat Network (the 527 organization) paid for the advertisements using nonfederal funds, and thus appear to have improperly used nonfederal funds for the purpose of influencing a federal election. As a result, there is reason to believe that NDN has financed some of its activities using nonfederal funds when those activities were required to be funded with at least some federal funds.

III. CONCLUSION

The Commission finds reason to believe that New Democrat Network and Simon Rosenberg, as Treasurer, violated 2 U.S.C. §§ 434, 441a(f), 441b(a) and 11 C.F.R. §§ 102.5, 104.10, 106.1 and 106.6.

27044181626